
2011 GAB 01
CAMPAIGN FINANCE – RECALLS

You are an attorney representing a committee supporting the recall of a legislator. You have asked a number of questions regarding limits on campaign contributions in a recall.

Campaign contribution limits are set forth in §11.26, Wis. Stats. Pursuant to §11.26(13m)(b), Wis. Stats., an exemption from the contribution limits applies to funds utilized:

For the purpose of payment of legal fees and other expenses incurred in connection with the circulation, offer to file or filing, or with the response to the circulation, offer to file or filing, of a petition to recall an officer prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending the order.

The contribution limits exemption of §11.26(13m)(b), Wis. Stats., applies equally to any person, individual, or committee utilizing funds for the purpose of payment of legal fees and other expenses incurred in connection with the circulation, offer to file or filing, or with the response to the circulation, offer to file or filing, of a petition to recall an officer prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending an order for a recall election.

Questions and Responses:

1. You have asked the Board to confirm your understanding that there are time-related and use-based components to the scope of the exemption from contribution limits found in §11.26(13m)(b), Wis. Stats., which focuses on when expenses are *incurred*, not when funds are raised, and that the expenses must be incurred in connection with specific aspects of the process for obtaining or opposing an order for a recall election.

Response: The Board confirms that there are time-related and use-based components to the scope of the exemption from contribution limits found in §11.26(13m)(b), Wis. Stats. The time-related component of the scope of the exemption requires that the expenses must be incurred prior to the time a recall primary or election is ordered. The use-based component of the scope of the exemption allows for qualifying expenses to include legal fees and other expenses incurred “in connection with” or “with the response to” the circulation, offer to file or filing, of a petition to recall an officer, or if incurred in contesting or defending the order for a recall primary or election.

2. You have asked the Board to confirm your understanding that funds raised pursuant to the exemption from contribution limits found in §11.26(13m)(b), Wis. Stats., could not be used for expenses incurred in connection with public advocacy and persuasion after recall petitions are “offered for filing” because public advocacy subsequent to recall petitions offered for filing would not be “in connection” with the recall-related efforts.

Response: The Board disagrees with your understanding. Qualifying expenses incurred prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending the order, may be paid for with funds raised pursuant to the exemption from contribution limits found in §11.26(13m)(b), Wis. Stats. This is the only time-related component to the scope of the exemption.

Furthermore, the scope of the exemption covers expenses incurred “in connection with” and also expenses incurred “with the response to” the circulation, offer to file or filing of a recall petition. This statute permits the petitioner and the officer subject to the recall to respond to a recall petition “offered for filing,” as well as to the “filing” of a recall petition by the filing officer—in the instant matter, the Government Accountability Board. Pursuant to §9.10(3)(b), Wis. Stats., upon a finding that the petition is sufficient, the Board both files the petition and calls the recall election. Expenses incurred for public advocacy subsequent to a recall petition being offered for filing could be found to be either “in connection with” or “with the response to” the offer to file by the petitioner or filing of a recall petition by the filing officer. If these expenses are incurred prior to the time a recall primary or election is ordered, they may be paid for with funds exempt from contribution limits.

The use-based component to the scope of the exemption is broad and can even include expenses incurred after a recall primary or election is ordered, so long as those expenses are incurred in contesting or defending the order. The circulation, offer to file, challenge, rebuttal, reply, review, and finally even the filing of the recall petition are all recall-related efforts included within the use-based component of the scope of the exemption.

3. You have asked the Board to confirm your understanding that recall-related expenses paid for by funds raised pursuant to the exemption from contribution limits found in §11.26(13m)(b), Wis. Stats., applies broadly and includes expenses incurred for public advocacy and persuasion, e.g., television ads, mailings to the public and voter outreach.

Response: The Board confirms that there is a broad spectrum of qualifying recall-related expenses, which includes expenses incurred for public advocacy and persuasion, e.g., through media such as television, radio, or print ads; mailings to the public; telephone calls; and various forms of canvassing and other voter outreach.

However, for any qualifying recall-related expenses, but especially public advocacy and persuasion, there must be a reasonable nexus between the incurred expense and the the circulation, offer to file or filing, of a petition to recall an officer, or in connection with the response to the circulation, offer to file or filing, of a recall petition. For instance, incurred expenses for any public advocacy and persuasion that includes language expressly advocating the election or defeat of a candidate in the potential recall election clearly does not qualify for use of funds raised pursuant to the exemption from contribution limits, but instead must be paid for with campaign funds that are subject to contribution limits.

Additionally, incurred expenses for public advocacy and persuasion completely devoid of specific references to the recall effort or recall policies clearly do not qualify for the use of funds raised pursuant to the exemption, e.g., a television advertisement proclaiming only that an officer is a good public servant and identifying some of his or her accomplishments.

Persons, individuals, or committees incurring qualifying recall-related expenses and also incurring campaign-related expenses must exercise careful and detailed accounting practices when completing required campaign finance reports. Furthermore, where contributions are initially received for qualifying legal and recall-related expenses but

later are used for campaign-related expenses, notice should be provided to the contributors informing them of the conversion to campaign-related use. Such use of the contributions make them attributable to those contributors for the purposes of individual contribution limits for the relevant campaign period, as well as the aggregate annual contribution limits for those affected contributors.

Analysis:

The following detailed analysis more fully sets forth the basis for the responses provided above. In addition, please note that the Board incorporates its Memorandum dated March 15, 2011, entitled "Recall Expense Funds: Contribution Limits and Residual Funds," as modified by the Board at its March 22, 2011 meeting.

Limited Statutory Exemption from Contribution Limits for Recall Expenses:

Limitations on contributions are prescribed by §11.26, Wis. Stats., which establishes specific dollar amount or percentage limitations including, but not limited to, the following:

- Individual contributions (§11.26(1), Wis. Stats.)
- Committee contributions other than from a political party or legislative campaign committee (§11.26(2), Wis. Stats.)
- Calendar year individual aggregate contributions of \$10,000 to all candidates for state or local office, as well as individuals and committees, legislative campaign committees and political parties, whether local or state (§11.26(4), Wis. Stats.)
- Contributions received by political parties (§11.26(8), Wis. Stats.)
- Contributions to candidates from committees, legislative campaign committees, and political parties (§11.26(9), Wis. Stats.)

However, pursuant to §11.26(13m)(b), Wis. Stats., contributions are not subject to these limitations when utilized for the purpose of payment of legal fees and other expenses incurred in connection with the circulation, offer to file or filing, or with the response to the circulation, offer to file or filing, of a petition to recall an officer prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending the order. Once a recall committee files a registration statement (GAB-1), the exemptions from the §11.26, Wis. Stats., contribution limits apply. These exemptions apply equally to any person, individual, or committee utilizing funds for the purpose of payment of legal fees and other expenses incurred in connection with or with the response to the circulation, offer to file or filing, of a petition to recall an officer prior to the time a recall primary or election is ordered, or after that time if incurred in contesting or defending an order for a recall election. The exemptions from contribution limits only apply up to the total amount of legal fees and all other expenses incurred in connection with or with the response to the circulation of a recall petition, offer to file or filing, and challenge or defense of an order for a recall election.

Expenses incurred after a recall election is ordered may not be paid with funds raised pursuant to the contribution limit exemption of §11.26(13m)(b), Wis. Stats., unless the expenses are incurred specifically for contesting or defending the order for a recall election. Incurred recall

legal fees and other expenses that may be paid from contributions that are exempt from limitations are permitted only until the latest of any of the following:

- The date the recall committee terminates its registration, if such termination occurs prior to the petition having been offered for filing.
- The date the recall petition is determined insufficient or the time period to offer the petition for filing expires.
- The date the recall election is ordered.
- The date any contest or defense of the order for recall election concludes.

Limitations on contributions prescribed by §11.26, Wis. Stats., always apply to all contributions that exceed the amount of legal fees and all other expenses incurred in connection with the circulation of a recall petition, offer to file or filing, and challenge or defense of an order for a recall election.

For purposes of this opinion, the latest date as described above shall be identified as the “conversion date,” meaning the date the residual recall funds (those that exceed incurred recall expenses) convert to contributions subject to limitations prescribed by §11.26, Wis. Stats. Upon reaching the conversion date and assuming all incurred recall expenses are satisfied, the limitations on contributions prescribed by §11.26, Wis. Stats., apply to the residual recall funds. However, if incurred recall expenses remain unsatisfied at the conversion date, individuals, committees, legislative campaign committees and political parties may continue to receive contributions exempt from §11.26, Wis. Stats., limitations until sufficient contributions are received to satisfy the recall expenses.

Application of §11.26(13m)(b) Exemption in Context of Extended Certification Deadlines:

Once a recall petition is offered for filing to the G.A.B. against a legislator, §9.10(3)(b), Wis. Stats., prescribes deadlines for filing challenges to the petition, rebuttals, and replies, as well as the deadline by which the G.A.B. must file a certificate of sufficiency or insufficiency. Within 10 days after a recall petition is offered for filing, the officer against whom the recall petition is filed may file a written challenge specifying any alleged insufficiency. If a challenge is filed, the recall petitioner may file a written rebuttal to the challenge within 5 days after the challenge is filed. If a rebuttal is filed, the officer against whom the recall petition is filed may file a reply to any new matter raised in the rebuttal within 2 days after the rebuttal is filed. Within 31 days after the recall petition is offered for filing, the G.A.B. shall determine by careful examination whether the petition on its face is sufficient and so state in a certificate attached to the petition and if sufficient, file the recall petition and call a recall election to be held on the Tuesday of the 6th week commencing after the date of filing the petition by the G.A.B.

However, pursuant to §9.10(3)(b), Wis. Stats., and upon a showing of good cause, a circuit court for the county in which the recall petition is offered may grant an extension of any of the aforementioned deadlines, including the 31-day deadline for the G.A.B. to certify sufficiency or insufficiency and the date of any recall election. Where a circuit court exercises this authority as occurred with the recall petitions which are the subject of your request for advice, there is an impact on the application of the §11.26(13m)(b), Wis. Stats., exemption from contribution limits for qualifying legal and other recall-related expenses. The time period to incur such expenses, funds for payment of which are exempt from contribution limits, is

extended when the circuit court extends the G.A.B.'s deadline to certify sufficiency and call a recall election. This impact is equally available to any person, individual, or committee utilizing funds for the purpose of legal fees and all other expenses incurred in connection with or with the response to the circulation of a recall petition, offer to file or filing, and challenge or defense of an order for a recall election.

The qualifications for use of the §11.26(13m)(b), Wis. Stats., exemption from contribution limits is set forth generally above. The exemption from contribution limits for funds utilized for qualifying legal fees and other recall-related expenses applies until a recall election is ordered, unless the expenses are incurred specifically for contesting or defending the order for a recall election. The statute is clear that the exemption does not end when a recall petition is offered for filing, but rather ends only when "a recall primary or election is ordered."

Advice:

As outlined above, the Board offers the following summary of its advice.

1. Contributions exempt from campaign finance limits pursuant to §11.26(13m)(b), Wis. Stats., may be used only for qualifying legal fees and other recall-related expenses incurred before a recall election is ordered, unless the expenses are incurred specifically for contesting or defending the order for a recall election. Qualifying expenses include legal fees and other expenses incurred "in connection with" or "with the response to" the circulation, offer to file or filing, of a petition to recall an officer, or if incurred in contesting or defending the order for a recall primary or election
2. Qualifying expenses under §11.26(13m)(b) may include public advocacy and persuasion after recall petitions are offered for filing, if such expenses are incurred in connection with the circulation, offer to file or filing, of a petition to recall an officer, or in connection with the response to the circulation, offer to file or filing, of a recall petition . The statute is clear that the exemption does not end when a recall petition is offered for filing, but rather ends only when a recall primary or election is ordered.
3. The Board confirms that there is a broad spectrum of qualifying recall-related expenses, which includes expenses incurred for public advocacy and persuasion. However, for any qualifying recall-related expenses, but especially public advocacy and persuasion, there must be a reasonable nexus between the incurred expense and the circulation, offer to file or filing, of a petition to recall an officer, or in connection with the response to the circulation, offer to file or filing, of a recall petition. This is a factual determination.